

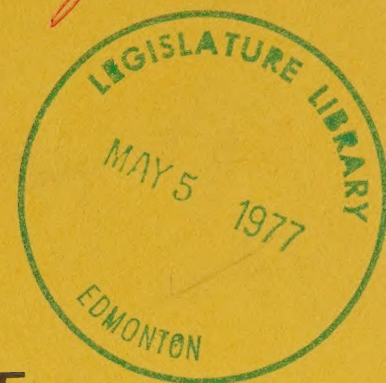
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REPORT OF THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY

TO REVIEW LEGISLATION ON THE OMBUDSMAN ACT

May, 1977

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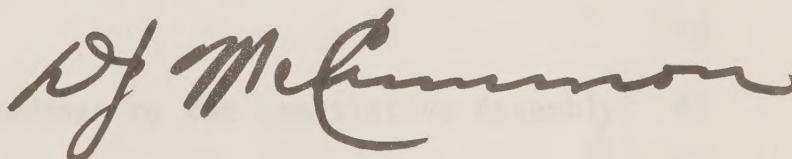
TABLE OF CONTENTS

Executive Summary	1
List of Submissions	2
Acknowledgements	3
Preface	4
Review of Activities	7
Committee Findings and Recommendations	11

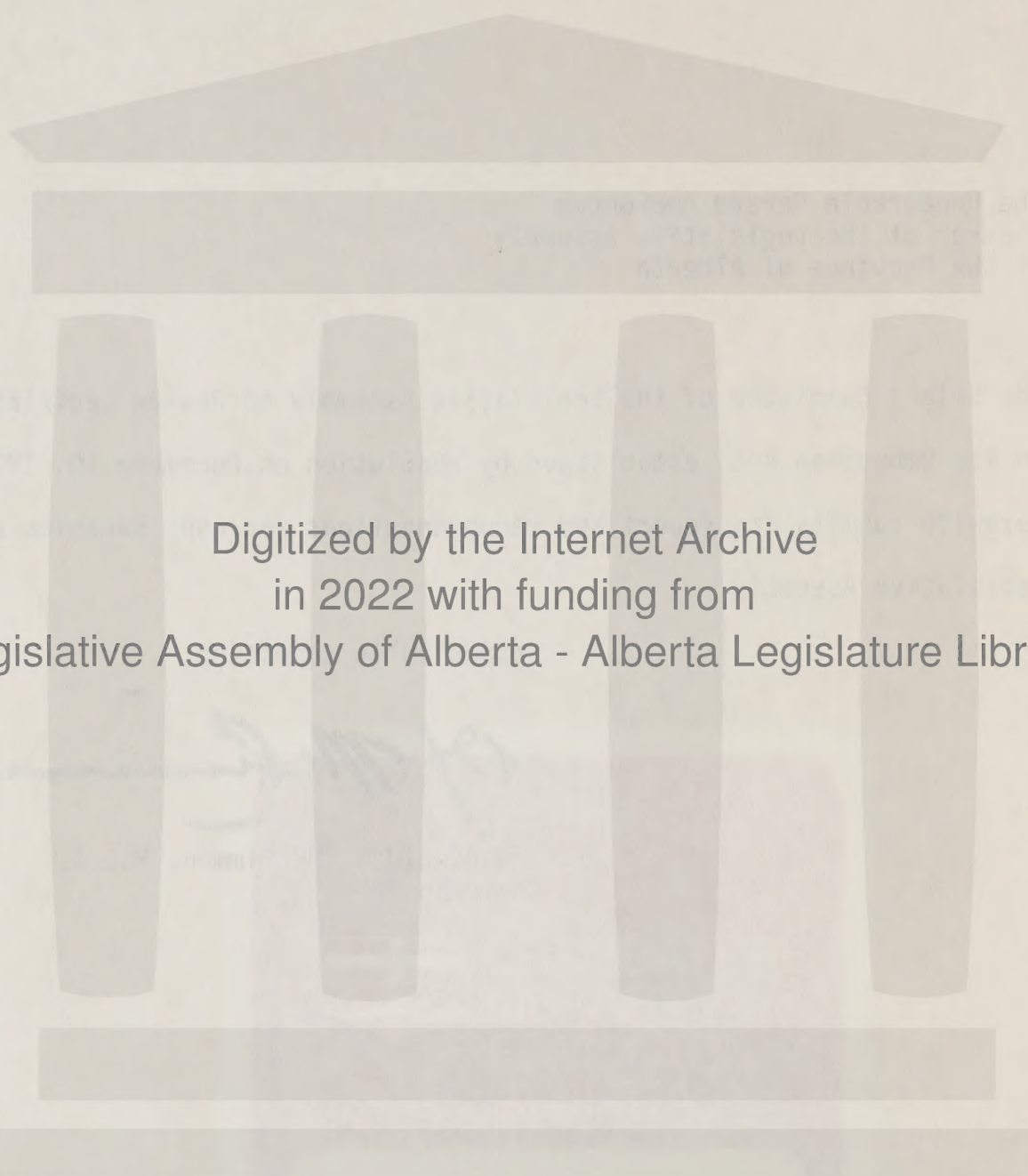
The Honourable Gerard Amerongen
Speaker of the Legislative Assembly
of the Province of Alberta

The Select Committee of the Legislative Assembly to Review Legislation
on The Ombudsman Act, established by resolution on December 10, 1975,
herewith submits its report and recommendations for consideration by the
Legislative Assembly.

Respectfully submitted,



Dr. Donald J. McCrimmon, M.L.A.
Chairman



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TABLE OF CONTENTS

Committee Membership	1
List of Submissions	2
Acknowledgements	3
Preface	4
Review of Activities	7
Committee Findings and Recommendations	
Jurisdiction	
Definition of Agency	10
Hospitals	11
Human Rights Commission	13
Municipalities	14
School Boards	17
R.C.M.P.	18
Universities	19
Farmers' Advocate	20
Control of the Office of Ombudsman by the Legislative Assembly	21
Role of a Standing Committee	22
Initiation of a Complaint	23
Refusal to Investigate	24
Waiver of Use of Appeal Mechanisms	25
Ombudsman Access to Confidential Government Files	26
Disposition of Closed Files	27
Public Access to Closed Files	28
Correspondence	29
Right to be Heard: Hearings Before the Ombudsman	30

Visits to Institutions	31
Publicity	31
Native Program	32
Consultation With Other Ombudsmen	33
Proliferation of the Title Ombudsman	33
Penalty Clause	34
Protection From Potential Court Action	34
Salary	35
Pension	35

MEMBERS OF THE SELECT COMMITTEE TO REVIEW LEGISLATION ON THE OMBUDSMAN ACT

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Deputy Speaker
Chairman

Hon. S. McCrae, M.L.A.
Calgary Foothills
Minister Without Portfolio
Responsible for Calgary Affairs

Mr. J. Butler, M.L.A.
Hanna-Oyen

Mr. R. Clark, M.L.A.
Olds-Didsbury
Leader of the Opposition

Mr. B. Purdy, M.L.A.
Stony Plain

Mr. P. Trynchy, M.L.A.
Whitecourt

LIST OF SUBMISSIONS

- *Alberta Association for Children with Learning Disabilities
- *Alberta Association of Municipal Districts and Counties
- Alberta Federation of Labour
- *Alberta Seventh Step Society
- Alberta Urban Municipalities Association
- *Alberta Union of Provincial Employees
- J. E. Bradley, Chairman, Alberta Hospital Services Commission
- James N. Burness, Lethbridge
- Mrs. Hazel Cameron, Edmonton
- Camrose Chamber of Commerce
- City of Edmonton
- County of Lac St. Anne
- County of Ponoka
- *S. Egbert, A. Esaw, G. Fixler, D. Goldenberg: U. of A. Administrative Law Students
- Rev. A. E. Gans, Westlock
- *Peter Gerlitz, Calgary
- *David Goldenberg, Calgary
- *William Gowans-Smith
- *Dr. Karl Friedmann, Calgary
- Dr. Randall Ivany, Ombudsman
- Law Society of Alberta
- P. A. Leriger, Improvement District Administrator, Westlock
- George D. Logan, Edmonton
- *Albert Ludwig, Q.C., Calgary
- R. H. MacLachlan, Edmonton
- Municipal District of Sturgeon
- *Henry Pirker, Debolt
- *Tom Roach, Edmonton
- Red Deer & District Association for Children with Learning Disabilities
- J. Tai, Pincher Creek
- Kelly R. Thome, Red Deer
- Town of Picture Butte
- Unifarm
- *University of Alberta Students' Union
- *University of Calgary Students' Union
- G. R. Whenham, Edmonton

* Individuals and groups that appeared before the Committee at the Public Hearings held in Edmonton and Calgary October 5th and 6th, 1976 respectively.

ACKNOWLEDGEMENTS

The Committee wishes to extend its sincere appreciation to all those people who took the time and effort to write submissions and to appear before the Committee at the public hearings. We especially appreciated the kind gesture initiated by Dr. J.P.S. McLaren, Dean of the Law School in Calgary for offering the use of the facilities at the Law School for our public hearings in Calgary. We also wish to acknowledge the many people who assisted the Committee from time to time in the gathering of information the Committee required to carry out its functions and duties.

Special thanks are due to the following individuals for their extensive contributions and co-operation.

Betty Maurice, Secretary

Penny Shafto, Research Assistant

David Blakeley, Research Assistant

Mike Clegg, Law Clerk

Alex Weir, Solicitor to the Ombudsman

Karl Friedmann, Professor, University of Calgary

Larry Hill, Professor, University of Oklahoma

Bernard Frank, Chairman, International Bar Association

Blake McDougall, Librarian, Legislative Building Library

PREFACE

In 1809 Sweden created the office of the Ombudsman as an official appointed by government to investigate complaints by individuals against oppressive bureaucratic action.¹ Since that time the concept of the Ombudsman has been gaining recognition all across the world. Alberta was the first jurisdiction in North America to create such an office. Many other jurisdictions, including seven other Canadian provinces, have determined that the creation of such a complaint mechanism is appropriate at national, state and municipal government levels.

The questions arise as to why it is necessary to create an office whose sole purpose is to act as a check on administrative procedures and why the Ombudsman office has been chosen as the best means to achieve this purpose? The need for an institution such as the Ombudsman was well expressed by C. W. Clement when he stated:

...The Ombudsman is intended to be the little man's shield against the juggernaut of big government. In this age the job is essential to the preservation not only of true justice,² but also of the democratic structure itself.

Hence the primary reason for appointing an Ombudsman is so that he may function in the role of a 'complaintsman' and in so doing also act as an independent check to the many government processes affecting individuals.

The question still remains as to why an Ombudsman institution is best suited to review administrative procedure. Surely, it can be

¹ Larry B. Hill, draft manuscript for "Ombudsmen, Bureaucracy and Democracy" (New York: Oxford University Press forthcoming) frontpiece.

² C. W. Clement, "Independence of the Ombudsman", address delivered to the International Ombudsman Conference, Edmonton, Alberta, Sept. 7, 1976.

argued, one person cannot have control over the large bureaucracies that administer various government bodies. A succinct although academic explanation as to why the Ombudsman institution works so well is expressed by Larry Hill when he states:

"...It (the Ombudsman office) has created an intellectual environment which is receptive to proposals for administrative reform."³

The Ombudsman then does not have direct control over all administration as such, but his existence still has a far reaching effect on the bureaucracy. Civil servants must be prepared to answer to the Ombudsman on the proper application of administrative procedures determined by the Legislature.

It should be emphasized, however, that the Ombudsman institution does not only criticize administrative procedures. The majority of complaints reviewed by the Ombudsman are classified as not justified and therefore the administrative action criticized by the complainant is supported. Hence in many instances the Ombudsman ensures that the electorate's confidence in the government bureaucracy is maintained.

These roles of the Ombudsman are often misinterpreted because of a misunderstanding in the power granted his office. Alberta is similar to nearly all other jurisdictions in that it only allows the Ombudsman the power to recommend to the Legislature certain administrative procedural changes. There is no obligation that the Legislature is bound to follow any recommendation made by the Ombudsman.

³Larry B. Hill, *ibid*, page 8.

However, it is to the advantage of the Legislature to consider very seriously any recommendation to change the administrative process that has reflected badly in the public eye.

Chief Justice Milvain provided an excellent interpretation of the purpose and role of the Ombudsman in Alberta in a judgement which stated in part:

"...The basic purpose of an Ombudsman is provision of a watchdog 'designed to look into the entire workings of administrative laws...The Ombudsman has no power of reversing any decision or compelling an action or prohibition of any action. His function is to investigate and report with the necessary recommendation...The Ombudsman can bring to the Legislature his observation on the misworkings of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the Ombudsman is also a fallible human being and not necessarily right. However, he can bring the 'lamp of scrutiny' to otherwise dark places even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded collective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good."⁴

In light of the above, the Select Committee presents its findings and recommendations.

⁴Re: The Ombudsman Act, Alberta Canada. Judgement delivered January 6, 1970 (1970-72) WWR 176 and 1970 10 DLR (3rd) 47, Honorable Justice J. V. H. Milvain.

REVIEW OF ACTIVITIES

Pursuant to a motion proposed by the Honourable Mr. Hyndman on December 15, 1975, a Select Committee to Review Legislation on the Ombudsman was created. The resolution stated:

Be it RESOLVED THAT,

1. A Select Committee of this Assembly be established consisting of the following members:

Chairman: Dr. D. McCrimmon

Members: Hon. S. McCrae
J. Butler
R. Clark
W. Purdy
P. Trynchy

with instructions:

- (a) to receive representations and recommendations as to the operations of the Ombudsman Act; and
 - (b) that the Committee so appointed do meet for the purposes aforesaid at the call of the Chairman at such times and places as may from time to time be designated by him; and
 - (c) that the said Committee do report to this Assembly at its next ensuing Session the substance of the representations and recommendations made to the Committee together with such recommendations relating to the administration of the said Act as to the said Committee seems proper.
2. Members of the Committee shall receive remuneration in accordance with Section 59 of the Legislative Assembly Act.
3. Reasonable disbursements by the Committee, for clerical assistance, equipment and supplies, advertising, rent and other facilities required for the effective conduct of its responsibilities, shall be paid, subject to the approval of the Chairman, out of Appropriation 1909.

During the first 6 months after the Committee's appointment, much time was spent determining what issues the Committee should focus on. We also met with the previous Ombudsman, Mr. George McLelland, and the present Ombudsman, Dr. Randall Ivany, to discuss the legislation. Courtesy letters were sent out inviting submissions to organizations and individuals across the province who had an express interest in the Office of the Ombudsman.

In July, advertisements were placed in all Alberta newspapers inviting submissions from the public to be received by the Committee before September 15, 1976. Because we did not receive a large number of responses, further letters were sent to every city, town, county, municipal district and improvement district requesting submissions from them. Thirty-six submissions were received in total.

On reviewing the number of submissions received, public hearings were held only in Edmonton and Calgary on October 5th and 6th, 1976 respectively.

The First International Ombudsman Conference was held in Edmonton in 1976 and Dr. Ivany kindly invited members of the Committee and its staff. Those who did attend found the experience rewarding; it provided a good comparative background in the development of the Ombudsman institution across the world.

The Committee found it necessary to file an Interim Report in October to recommend adjusting the Ombudsman's salary. His salary had not been adjusted since January, 1975 and it was thought an interim adjustment was required. An appropriate amendment to The Ombudsman Act was assented to on November 4, 1976, adjusting his salary from \$34,000 a year, to \$36,400, effective as of April 1, 1976.

Taking into consideration all these inputs into the Committee, the Committee drafted the report now before you.

The Committee found that extensive changes to the Act were not required. Other Canadian provincial jurisdictions have tended to follow the pattern set by the Alberta Act. The changes we are recommending should therefore be considered as updating rather than major policy changes.

AGENCY

Definition

A particularly complex issue the Committee has attempted to resolve relates to the question of what is a government agency within the parameters of The Ombudsman Act? There have been a number of agencies which do not consider themselves as government agencies and therefore question whether or not the Ombudsman has the jurisdiction to investigate.

To make the legislation more explicit the Committee recommends that agencies should be defined in The Ombudsman Act as: all agencies, boards, and/or commissions, the majority of whose members of the governing body are appointed by the Lieutenant Governor in Council or pursuant to an Act or are public servants appointed under the Public Service Act.

There are, however, certain exclusions the Committee recommends. These agencies, as presently constituted, are:

1. P.W.A.
2. Alberta Energy Company
3. Crown Hospitals:
 - University of Alberta Hospital
 - The W. W. Cross Cancer Institute
 - The Glenrose Provincial General Hospital
 - The Foothills Provincial General Hospital
 - The Alberta Children's Provincial General Hospital
4. Universities and Colleges
5. Human Rights Commission

HOSPITALS

The Ombudsman, in his submission to the Select Committee, requested that the matter of jurisdiction over Provincial General Hospitals be clarified by the Committee. The Committee received several submissions requesting that hospitals be included in the jurisdiction of the Ombudsman and one requesting that they be excluded.

It should be pointed out that in keeping with the definition of agency recommended by the Committee the hospitals considered were the five Provincial Hospitals which have appointed boards. Those are the University of Alberta Hospital, the W. W. Cross Cancer Institute, the Glenrose Provincial General Hospital, the Foothills Provincial General Hospital and the Alberta Children's Provincial General Hospital.

It appears that there is an appeal procedure in existence at each of the Provincial Hospitals with the appeal handled by the individual board concerned. As each board is autonomous any decision reached is final, however the procedure is subject to review by the Hospital Services Commission to assure fairness. In some cases if this fails there is still recourse to the courts.

It must be pointed out however that the Committee, while recognizing that there is an appeal procedure at these hospitals, recommends that it should be re-assessed and improved. The Hospital Services Commission should attempt to formalize these procedures or in some other way assure consistency at all of the institutions under its purview and especially the five Provincial Hospitals. It is recommended that an individual be appointed by each hospital board to receive complaints, whether from staff or patients, and bring these complaints before the

board at regular intervals. Patients and staff should then be made aware of what avenues of appeal are available.

The Committee recommends that some consideration should be given to having a portion or percentage of the boards of the five Crown Hospitals elected in order to enable more public participation in the operation of these institutions.

In addition to the previous mentioned procedures, the Hospital Visitor Committee has the power to tour hospitals, investigate the broader problems, and point them out in their annual report to the Legislature.

As the Hospital Services Commission appears to have the power to provide a type of ombudsman function, and as this service should preferably be carried out by a body or individual familiar with the operation of a hospital the Committee recommends that the Provincial Ombudsman should not have these hospitals included in his jurisdiction.

The Committee strongly feels that patients and staff should have the right to have their grievances aired and that hospitals presently have the capacity to adequately provide and carry out this function. The Committee is satisfied that the system is capable of handling the situation at this time, however, if this does not prove to be the case, the Legislature may, in the future, be required to become involved, perhaps by utilizing the Provincial Ombudsman.

HUMAN RIGHTS COMMISSION

The Ombudsman in his submission to the Select Committee pointed out that the Human Rights Commission serves a similar, but distinct purpose from the Ombudsman. The result has been that both offices will receive complaints simultaneously, with an obvious effect of duplicating efforts. The Committee therefore recommends that the Human Rights Commission be excluded from the Ombudsman's jurisdiction, preventing a duplication of services within these two agencies.

MUNICIPALITIES

One of the more difficult questions presented to the Committee was whether or not the Ombudsman's jurisdiction should be extended to include municipalities. This question received more attention in the submissions to the Committee than any other.

Some submissions supported the extension on the principle that the rights of citizens needed to be protected both at the provincial and at the municipal level of government; however, the Alberta Association of Rural Municipalities, and other rural responses were adamantly against the extension. They seemed quite concerned that the extension of the Ombudsman's jurisdiction to rural municipalities would lead to the abolition of the office of the Farmer's Advocate. Some also expressed the view that people in rural areas have adequate access to their local representatives; they do not see the need for yet another intrusion of "big government" into their local autonomy.

The Committee feels that local autonomy should be protected and that the Provincial Government should not force the Provincial Ombudsman onto the municipalities. The decision as to whether or not to be included would ideally be made by the jurisdiction involved, but if the choice were left up to the individual municipality it is conceivable that one jurisdiction would utilize the Provincial Ombudsman and the neighboring jurisdiction would not. The obvious inequities, and the jurisdictional conflicts, which would arise as a result of this concept makes it untenable to the Committee.

In deciding whether local autonomy should be waived in order to extend the jurisdiction of the Ombudsman, the Committee explored the demand for such service. A close examination of the submissions as well

as the pertinent statistics reveals that there is not an overwhelming demand for the Ombudsman's services at the municipal level. Not only were the actual numbers not convincing but a review of the type of complaints received, especially in provinces where municipalities are included, reveal that they could probably be better handled at the local level.

Basically for the above reasons, the Committee does not feel that the time is right for the Ombudsman to become involved in the area of municipalities and therefore recommends that the jurisdiction of the Provincial Ombudsman should not be extended at this time. If, in the future, the municipalities collectively feel that they wish to be included under the Provincial Ombudsman, they can request that of the Legislative Assembly.

The Committee does feel very strongly that citizens should have an avenue available to them in order to air their complaints against municipal government. It appears that the best way to handle this is to change the appropriate legislation in order to allow the municipalities to set up their own ombudsman-type office. As rural municipalities do not really have the demand for an office in each jurisdiction it was the Committee's feeling that they should be able to set up one ombudsman-type office which would be responsible for all rural municipalities.

The Committee therefore recommends that:

Regarding Urban Municipalities:

Changes may be made in the appropriate provincial legislation to enable the council of any urban municipality the right to establish an ombudsman-type position with all the independence, power of inquiry, access to records, and the power to compel witnesses, necessary to function within that urban municipalities' jurisdiction.

The position would not be responsible to the Provincial Ombudsman and would be funded by the jurisdictions involved.

Regarding Rural Municipalities:

The Alberta Association of Rural Municipalities may, by passage of a majority resolution at its annual meeting, have the right to: appoint or have appointed, an ombudsman-type position with all the independence, power of inquiry, access to records, and the power to compel witnesses, necessary to function within the jurisdiction of the rural municipalities. The position would not be responsible to the Provincial Ombudsman and would be funded by the jurisdictions involved.

SCHOOL BOARDS

Those Boards which are provincially appointed would automatically come under the Ombudsman's jurisdiction as set out in the definition of agency. Those which are elected would not, and as the Committee has recommended that urban municipalities be given the power to set up their own ombudsman-type office, it would be up to the school boards concerned to decide if they would be included in that office.

If the Alberta Association of Rural Municipalities chooses to set up an ombudsman-type office the school boards, or school committees, under rural municipal jurisdiction would automatically come within the jurisdiction of that office.

R.C.M.P.

In a case reviewed by the Saskatchewan Supreme Court in 1974, a judgement delivered by Mr. Justice Bayda stated in part:

The R.C.M.P. occupy an anomalous and unique constitutional position in our structure of government and if their acts are to be amended to the investigatory duties and powers of the Provincial Ombudsman, the legislative enactment (assuming the legislature has competence in this field - a question still at large) prescribing those duties and powers should so state in unequivocal terms.⁵

Before this decision, Provincial Ombudsmen across Canada have assumed that they had the jurisdiction to review complaints about the R.C.M.P. as long as those complaints related to administration of provincial laws. Since this case, however, complaints about the R.C.M.P. have not been investigated.

The Committee feels that legislating control over the R.C.M.P. under the Provincial Ombudsman would be difficult and unnecessary. If there is a demand for an additional appeal mechanism, the mechanism should be created either by the R.C.M.P. or through action by the federal government. The Committee therefore recommends that no action be taken by the provincial government to extend our Ombudsman's jurisdiction to include the R.C.M.P.

⁵ Re: The Ombudsman Act Saskatchewan, Canada
Judgement Delivered May 13, 1974 (1974 5WWR 176).

UNIVERSITIES

Due to the concerns expressed by students at the University of Alberta and the University of Calgary in submissions received by the Committee and at the public hearings concerning the Ombudsman's involvement in appeal procedures, the Committee feels it must comment on the matter. The problem seems to be due to the existing appeal procedures which have been described as, among other things, too formal and intimidating.

Although the Committee is not in a position to comment on the equity of any appeal procedure it is evident that there is a problem in this area within the university community. The Committee feels that, due to the unique nature of the universities, the Provincial Ombudsman should not become involved. Students require early and quick redress to their grievances by someone familiar with procedures in the institution which at this time the Ombudsman cannot provide. An independent individual or body would be desirable, however the autonomy of the universities should be respected.

The Committee therefore recommends that the university communities re-assess their appeal procedures and arrive at a system which would enable an individual to have his grievances more equitably explored and settled. We feel it is important to point out that students in the provincial institutions, where the Ombudsman has authority, do not appear to have as serious problems with their appeal procedures as those students in the universities. This could be in part due to the salutary effect of the Ombudsman, and while the Committee is loath to interfere with the autonomy of the universities, it must be pointed out that if this matter cannot be settled internally, any future committee must consider involving the Provincial Ombudsman.

FARMER'S ADVOCATE

Although the Committee was asked to deal with issues relating to The Ombudsman Act, we have received a number of submissions which do not differentiate between the Offices of Farmer's Advocate and the Ombudsman. Many expressed a concern that the Committee intended to recommend that the Office of Farmer's Advocate be abolished. The Committee would like to emphasize that the Farmer's Advocate has a separate and unique function, which should not interfere with the Ombudsman. We have received no indication that the role the Advocate is playing in resolving rural complaints should be changed in any way. We would recommend, therefore, that this office be kept as a separate entity from the Ombudsman in order that it may continue to perform in the same useful capacity it has to date.

CONTROL OF THE OFFICE OF OMBUDSMAN BY THE LEGISLATIVE ASSEMBLY

It was pointed out by one submission received by the Committee that there was an inconsistency between the creation of the Office of the Ombudsman and control of that office. More specifically, the Ombudsman is created as an officer of the Legislative Assembly, but the Lieutenant-Governor in Council maintains control over appointment (Sec. 3(2)), temporary appointment (Sec. 7(3)), delegation of powers (Sec. 25), procedures for suspension or removal of the Ombudsman (Sec. 6) and the rules for guidance (Sec. 27). The Committee generally felt that the principle of creating an officer of the Legislature to maintain the independence of that officer, should be extended to apply to control of the office. The Committee, therefore, recommends that this authority be transferred from Lieutenant-Governor in Council to the Legislative Assembly; decisions on matters relating to these sections should be referred to the Standing Committee on Laws and Regulations, with the reporting authority left to the Office of the Speaker. If a situation arises while the House is not in session, since the Committee on Laws and Regulations is dissolved at the end of each session, it is recommended that the Speaker be given the authority to reconvene a Committee, consisting of the previous members of the Committee, who shall act in this capacity until the next session. The Committee also recommends that the Ombudsman have direct access to this Standing Committee for consultation and authorization on changes in legislation or administration that may be required from time to time.

ROLE OF A STANDING COMMITTEE

It has become apparent to the Committee that the nature of Ombudsman legislation is such that there may be need for adjustments to the legislation and the administration of the office on a fairly regular basis. The Ombudsman has recommended that there be a standing committee of the Legislature, created specifically for that purpose. However, Committee members felt that the Standing Committee on Laws and Regulations could appropriately handle this responsibility. The Committee therefore recommends that the Standing Committee on Laws and Regulations be assigned this responsibility, and no further standing committee be appointed at this time.

INITIATION OF A COMPLAINT

Section 11(1) and Section 14(2)(b)(iii) only allow a complaint from a person who is in his person directly affected by a decision made by a government department or agency. Section 11(4) provides that a Committee of the Assembly may request the Ombudsman to investigate subject matter before the Committee, but there is no provision to allow M.L.A.'s the right to initiate a complaint. Although the Committee has received recommendations to allow M.L.A.'s, the Cabinet or the Premier to initiate a complaint or request an investigation into a certain subject, the Committee feels that such an amendment would be inappropriate. Certain other jurisdictions which have extended the Ombudsman's powers to these areas have experienced difficulties with the type of assignment the Ombudsman has received, some of which were outside the usual parameters of his office. The Committee therefore recommends that no change be made to allow other than a person directly affected by a complaint to request the Ombudsman to investigate a complaint.

REFUSAL TO INVESTIGATE

The Committee received recommendations suggesting that Section 14(3) should expressly require the Ombudsman to give reasons for refusing to investigate a complaint. It is the Committee's understanding that wherever possible, the Ombudsman does, on an informal basis, give his reasons for not investigating a case, and where appropriate he will refer the complainant to another person or agency. The Committee does not, therefore, think it necessary to make any changes to the Act, to bind the Ombudsman to give reasons for his decisions not to investigate. The Committee therefore recommends that Section 14(3) should not be changed in any way to take away the discretion of the Ombudsman, useful in the fulfillment of his duties.

WAIVER OF USE OF APPEAL MECHANISMS

Section 12(1)(a) of The Ombudsman Act states:

12(1) Nothing in this Act authorizes the Ombudsman to investigate

(a) any decision, recommendation, act or omission in respect of which there is under any Act a right of appeal or objection or a right to apply for a review on the merits of the case to any court or to any tribunal constituted by or under any Act, until after that right of appeal or objection or application has been exercised in the particular case or until after the time prescribed for the exercise of that right has expired....

Submissions were received requesting that the Act be made more flexible in this regard, i.e., there should be a discretionary clause in the Act, allowing the Ombudsman to investigate certain complaints where he deems the use of the appeal mechanism is inappropriate. The Committee feels it would be unwise to have people seek the Ombudsman's help if there is still legal recourse or appeal time running. The Committee, therefore, recommends that the Ombudsman be used only as a final resort appeal mechanism, and that the Ombudsman be allowed no discretion on this issue.

OMBUDSMAN ACCESS TO CONFIDENTIAL GOVERNMENT FILES

The Ombudsman has had difficulty in gaining access to reports listed as confidential by a government department or agency. Particular problems have been created where a complaint has been raised which requires access to information contained in Child Welfare files, Pre-Sentence Reports, and Mental Health Records. Although the Committee is aware of the sensitivity and confidentiality required to deal with such reports, it also feels that access to the information in the reports may be a necessity for the Ombudsman to make a fair determination on the case. The Committee therefore recommends that access to all pertinent records associated with both sides of a case be allowed, if permission is granted to the Ombudsman by the complainant.

DISPOSITION OF CLOSED FILES

One of the more sensitive issues presented to the Select Committee relates to the disposition of closed files. As the material within the files is confidential material, an appropriate method for storing those files must be determined. It was generally felt that the most appropriate action would be to move all closed files to the restricted records section in the Provincial Archives, two years after they were completed. After six years, it was felt that non-jurisdictional files should be destroyed, with the remaining files classified as within his jurisdiction, microfilmed and stored at the Archives. The restricted records section would deny any access to those files as determined by The Ombudsman Act.

PUBLIC ACCESS TO CLOSED FILES

Another sensitive issue is the aspect of access to closed files by those wishing to research various aspects of the Ombudsman institution. Three options are possible:

1. Access could be limited to certain legitimate research projects subject to stringent guidelines;
2. Access could be denied; but comprehensive case summaries provided by the Ombudsman;
3. All files could remain closed to all but the Ombudsman staff.

The Committee expressed concern that if access to the files were allowed, it would constitute a breach of confidentiality as originally promised those clients. Future complainants might hesitate to approach the Ombudsman knowing that their cases would eventually become public. The Committee therefore recommends that access to those files only be allowed with both the concurrence of the complainant and the discretion of the Ombudsman. Otherwise, case summaries should be provided, only giving information that would not lead to the identification of the complainant.

CORRESPONDENCE

Section 13 of the Act specifies that all correspondence from inmates of institutions to the Ombudsman must be forwarded unopened to the Ombudsman. In one submission received by the Committee, it was suggested the same protection should be given to correspondence from the Ombudsman as to correspondence to the Ombudsman. Although the Committee is sympathetic to the sentiment that inmates and/or patients should receive correspondence from the Ombudsman, the Committee does not think it necessary to make any legislative changes at this time. Once the Ombudsman has received correspondence from an inmate, or patient, we trust that the Ombudsman's Office can implement whatever steps are necessary to ensure the patient or inmate in turn receives correspondence from him.

RIGHT TO BE HEARD: HEARINGS BEFORE THE OMBUDSMAN

Section 26(3) of the Act obliges the Ombudsman to allow individuals on both sides of a particular case the right to be heard prior to the publication of a report to the Legislature or to the public. This section has been interpreted by some government officials to mean that any communication between the Ombudsman and the department in question, sent by mail, is a public document and therefore should necessitate that both sides of a case have the right to a hearing. The Committee has resolved that should not be the case; any public employee who had access to that document is bound by the Public Service Act to an oath of secrecy. A document listed as confidential, should therefore not be considered public. This distinction is important, not because it limits the people involved with a complaint the right to be heard, but rather that it limits a repetitive process. The Committee therefore recommends that continued support be given to the interpretation that if the Ombudsman intends to make an adverse report, the persons contained in the report should continue to have the right to be heard. However, this right to be heard should not automatically be activated upon notification of investigation.

VISITS TO INSTITUTIONS

The Ombudsman suggested that the Committee consider the possibility of directing the Ombudsman to tour the various provincial institutions and gaols on a regular basis. Section 24 of the Act gives him the power to inspect these institutions with the prior notification of the appropriate deputy minister. The Committee generally recommends that the Ombudsman use this privilege on a more regular basis as the situation demands.

PUBLICITY

Since Section 19 and 26(3) in the Ombudsman Act specifically give the Ombudsman the power to report on the operation and function of the Ombudsman office the Committee recommends the Ombudsman use this to good advantage. There are a number of ways of the Ombudsman could publically discuss his role with relation to complaints to facilitate the public's understanding and interest in his office.

NATIVE PROGRAM

It has been pointed out to the Select Committee, that although there are competent native organizations in the province, native people are generally inadequately informed about the Ombudsman or how it applies to them. As Mr. Roach stated:

"I think it should be very important that these native Albertans, while few in number, should have a good working knowledge of the Ombudsman Act because the actions of the respective departments of government affect their everyday lives more so than most other Albertans.When the least advantaged Albertans know how and when to call upon the Ombudsman, then the spirit and the intent of the legislation will be realized"*

The Committee therefore suggests that the Ombudsman's Office, in conjunction with the Native Secretariat, initiate a program to inform the native people on how the Ombudsman legislation applies to them.

*From memorandum received September 15, 1976 by Mr. Tom Roach, Special Projects Officer, Department of the Attorney General.

CONSULTATION WITH OTHER OMBUDSMEN

Another issue raised by the Ombudsman for the Committee to resolve, was the question of whether or not it is a breach of secrecy to consult other Ombudsman on the particulars of a complaint. The Committee recommends that as all Ombudsmen are under a confidentiality oath, that a consultative approach between the Ombudsmen would be useful, and not contrary to his oath of secrecy.

PROLIFERATION OF THE TITLE OMBUDSMAN

It has been suggested to the Committee that the rather loose application of the term Ombudsman to many types of review mechanisms has detracted from both the stature and the understanding of the Ombudsman as created by provincial statute. Many other so-called "Ombudsmen" do not have the investigatory or recommendation powers as does the Ombudsman created by statute. It was advocated, therefore, that no person should call himself Ombudsman unless so designated by statute. However, the Committee felt there was no advantage to be gained at this time by such action, as proliferation of the title had already taken place. It is up to the Ombudsman to educate the public as to the difference in powers and function of the Provincial Ombudsman.

PENALTY CLAUSE

Section 28 of the Ombudsman Act provides that a person wilfully obstructing the Ombudsman, or making false statements to him"is guilty of an offence and is liable on summary conviction to a fine of not more than \$500 and in default of payment to imprisonment for a term not exceeding three months." The Committee recommends that the fine be increased to \$1,000 in accordance with the change in value of the dollar over the last 10 years.

PROTECTION FROM POTENTIAL COURT ACTION

The Ombudsman, in his submission, requested that consideration be given to provision for protection of himself and his staff from potential court action. The Committee feels that adequate protection is afforded in Section 23(1) of the present Act and that any additional protection could place him "above the law".

To avoid any legal conflicts however, the Committee recommends that the Ombudsman or his staff inform every complainant that appeal time is not affected by an investigation by the Ombudsman and if the appeal time lapses the Ombudsman is in no way responsible. It is suggested that a public notice in the Ombudsman's office, to that effect, may be useful.

SALARY

The present mechanisms relating to salary adjustment at this time seem unnecessarily cumbersome - any change to the Ombudsman's salary level requires an amendment to the Act, before he may receive an appropriate adjustment. The result has been, the adjustments have not been made at the same time or rate as for other senior public officials. The Committee, therefore, recommends that it would be appropriate to attach the Ombudsman's salary to that of a senior public official, such as the Provincial Auditor. On a long term basis, the Committee suggests this question be subject to a comprehensive review by the Committee revising M.L.A. salaries. The nature of the Ombudsman's work should allow the government to grant him use of a car in the same manner as those assigned to deputy ministers.

PENSION

Because the term of office for the Ombudsman differs from most government employees under the Management Pension Plan, the Committee suggested that appropriate adjustments should be made for his pension. The Committee, therefore, recommends the Ombudsman be eligible for a pension after 3 years of service on a scaled basis. This adjustment would make him eligible for pension within his term of office - present arrangements only allow him a pension after 6 years of service, 1 year longer than his term of office.

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